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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. Its general mission includes education and legal efforts directed towards limiting the power of the federal government and promoting individual liberty and free enterprise. Specifically, EFELDF has strived for years to defend and protect educa-

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[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the timely filing of all *amicus curiae* briefs in this matter and copies of their letters of consent have been lodged with the Clerk of the Court.

tional opportunity against government interference. EFELDF has long been an advocate for enhancing opportunities for men and women without ignoring important differences between the genders. EFELDF has successfully filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals. It also participates in educating and training students of all ages.

Amicus has a direct and vital interest in the issues presented to this Court based on its active participation in education for over two decades.

SUMMARY OF ARGUMENT

This action to eviscerate the precedent of *Alexander v. Sandoval* must fail. 532 U.S. 275 (2001). Only Congress, and not the courts, can create a private cause of action. Congress has not done so here. The male petitioner Roderick Jackson was replaced as the basketball coach of the schoolgirls' team, while retaining his teaching job. He cannot invoke Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, by claiming that the substitution was retaliation for his complaints about discrimination against the girls' team. The decision below properly denied a private cause of action for retaliation under Title IX.

Petitioner and his *amici* are mistaken in arguing that the judicially created private cause of action for alleged discrimination under Title IX has been beneficial and therefore should be expanded. Quite the contrary, the result of the existing private cause of action has been disastrous to the goals of Title IX to increase and protect athletic opportunities in schools. Schools have adopted a deleterious quota-like system in defense against actual and threatened lawsuits by private parties. Known as the "proportionality test," an informal regulation combined with many private claims has compelled colleges to reduce the proportion of men on their sports teams towards the proportion of men enrolled as students. 44 Fed.

Reg. 71,418 (1979) (advising that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This has thwarted opportunities for both men and women, and our overall athletic competitiveness has declined. There is no basis for extending this failure to a new genre of litigation for retaliation.

Petitioner Jackson had several existing remedies available to him for the retaliation that he alleges. He could have sued citing First Amendment protections for his speech, or taken action under Title VII for employment discrimination. There is no need or justification for expanding Title IX to address petitioner's complaint about being removed as the coach of a girls' basketball team.

ARGUMENT

I. TITLE IX DOES NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR THE ALLEGED RETALIATION.

This Court made clear in *Alexander v. Sandoval* that private causes of action can only be created by Congress, not by agencies or by federal courts. 532 U.S. 275 (2001). "[P]rivate rights of action to enforce federal law must be created by Congress . . . [and w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

As the government acknowledges here, "Title IX does not expressly authorize a private suit to enforce its prohibition." Brief for the United States as Amicus Curiae Supporting Petitioner [hereinafter, "Govt. Br."] at 8. Under *Sandoval*, that observation settles this matter. Federal courts cannot create private causes of action not authorized by Congress, and Congress did not authorize this type of action. Federal courts lack a general common law type of power, whereby

causes of action may be created willy-nilly to remedy perceived injustices.

The government, petitioner, and his *amici* rely entirely on decisions rendered *before Sandoval*. These precedents did allow private causes of action by direct victims of intentional sex discrimination under Title IX. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). More recent decisions, which also predate *Sandoval*, adhered to *stare decisis* and stayed the course. *See, e.g., Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). But those decisions are now anachronistic in light of *Sandoval*, and it is time to jettison their faulty premise that federal courts can somehow invent causes of action not expressly mandated by Congress.

This Court recently clarified that even an implied private cause of action cannot extend to where the statute lacks a private remedy. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). "[A] plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (emphasis in original). There was no such private remedy in *Gonzaga Univ.* for a proven violation of a student's privacy, and there is none here for alleged retaliation against a girls' basketball coach. The benefited class that is the focus of Title IX does not include advocacy by male basketball coaches, and hence petitioner Jackson lacks an implied cause of action.

Regardless of their continuing vitality, the *Cannon* precedents do not support the judicial creation of a new category of lawsuits for alleged retaliation. Petitioner, a male, was not "excluded from participation in, [] denied the benefits of, or [] subjected to discrimination under any education program or activity receiving Federal financial assistance" on the basis of his sex, as prohibited by Title IX. 20 U.S.C. § 1681(a). Only by piling inference upon inference is it possible to argue that

Congress authorized private actions for retaliation under Title IX. Such a conclusion here would eviscerate *Sandoval*, demolishing its barrier to judicial creation of new causes of action. It would become open season for all sorts of federal lawsuits alleging discrimination if a male can sue under Title IX based on his comments about school policies towards boys and girls.

"Retaliation" does not mean "discrimination" by any accepted use of those two terms, and Title IX protects only against "discrimination". The government baldly asserts that "[u]nder Title IX, retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination." Govt. Br. at 8. But at most the retaliation is based on what someone said, not on who he is. Retaliation could only consist of different treatment based on the exercise of free speech, not based on sex.

The government argues that because victims of sexual harassment have been allowed to sue under Title IX, then a victim of retaliation for speech must also be able to sue. But a bona fide victim of sexual harassment does indeed suffer because of her gender. A victim of retaliation for speech does not. He may be able to assert a claim based on infringement of his First Amendment rights, but nothing in Title IX supports the action at bar. Petitioner's own sex played no "role in the [decision-making] process" nor "had a determinative influence on the outcome," a limitation on Title IX actions that even the government concedes. Govt. Br. at 10 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

Judicial creation of a private cause of action would not advance the purpose of Title IX even if this test did survive *Sandoval*. Congress expressly limited the scope of its prohibition against sex discrimination, and plainly did not confer job entitlements on those who advocate identical treatment of boys and girls. Coach Jackson evidently has his own opinion of how boy and girl athletes should be treated, and he is free

to express it. But he does not magically receive job protection under Title IX based on his views and how he expresses them. The government argues that Title IX's "objectives would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Govt. Br. at 13. But this type of case first reaches this Court over thirty years after the passage of Title IX, illustrating how infrequent this retaliation is.

Congress did hear some testimony about retaliation prior to its enactment of Title IX. But to the extent legislative history is even relevant, such testimony supports the view that Congress declined to include in Title IX any protection against retaliation based on speech about sex discrimination. This could have been because real retaliation was rare, or because Congress respects employment at will, or perhaps even reflects a desire to avoid fomenting additional lawsuits in a litigious society. Regardless, federal courts cannot assume the legislative function and supplement what Congress passed. The government insists that "[t]here is no reason that Congress would have responded to that evidence by deliberately failing to address that aspect of the problem." Govt. Br. at 16. In fact, there are many possible reasons for Congress to leave that issue out of Title IX, as enumerated above, and the lack of litigation before this Court on this issue in over thirty years suggests that it was wisely omitted.

It is crystal clear under *Sandoval* that agencies, such as the Department of Education, may not by regulatory fiat create a private cause of action missing in the statute. Yet the government bases its argument for a private cause of action on a statement in the Federal Register that discriminatory "retaliation is prohibited by Title IX." Govt. Br. at 17 (citing 62 Fed. Reg. 12,044 (1997)). Insisting that *Chevron* deference is appropriate to regulations here, the government argues that this and other agency pronouncements support a private cause of action. *Chevron U.S.A. Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984). But *Sandoval* put an end to that game, and stopped the usurpation of congressional power by unelected administrators. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. *Chevron* has no application here.

Nor can a private cause of action be read into a statute by virtue of a prior decision of this Court addressing an entirely different statute and an entirely different form of discrimination. Petitioner relies heavily on *Sullivan v. Little Hunting Park, Inc.*, in which this Court found that overt and intentional racial discrimination prevented a white man from leasing property to an African-American. 396 U.S. 229 (1969). The Court allowed plaintiff Sullivan to pursue this claim based on his direct injury from the discrimination, and also to recover for retaliation that he suffered, in order to avoid "giv[ing] impetus to the perpetuation of racial restrictions on property." *Id.* at 237. But the existence of this precedent provides no support for the view that Congress intended a similarly broad remedy for athletic coaches allegedly complaining about disparate access to facilities. Congress may well have been aware of *Sullivan* but not inclined to extend it beyond racial covenants.

At bottom, this action is a direct challenge to *Sandoval*, a precedent that the government opposed then and implicitly continues to do so now. Martha Sandoval had no private cause of action for an alleged disparate impact on her national origin, and petitioner Jackson has no private cause of action for an alleged disparate impact on the girls he coached. Just as it would be absurd to allow state employees at the Alabama Department of Motor Vehicles to sue as a surrogate for Sandoval, petitioner Jackson cannot sue as a surrogate for the girls. It would gut *Sandoval* to shift the cause of action to a class of third-party private litigants a further step removed

from the statutory prohibition, and this Court should decline the invitation here to undermine its own recent precedent.

II. THE IMPLIED PRIVATE CAUSE OF ACTION UNDER TITLE IX HAS REDUCED OPPORTUNITY AND IMPAIRED COMPETITIVENESS.

The implied private cause of action under Title IX, combined with the informal regulation known as the "proportionality test," has spawned countless lawsuits to enforce quota-like policies. The proportionality test compares the male-to-female ratio on competitive sports teams with the male-to-female school enrollment ratio. 44 Fed. Reg. 71,418 (1979). This leads schools to eliminate sports teams in senseless ways that Congress never intended, and arguably even prohibited in Title IX itself. But in order to avoid million-dollar lawsuits and the prospect of paying plaintiffs' attorney's fees, schools have had little choice but to favor unthinking equality of result at the expense of opportunity for the most interested. That has meant eliminating hundreds of valuable athletic teams and opportunities for students in order to play a numbers game to equate overall male and female participation.

The result has been the elimination of hundreds of teams and an inevitable decline in competitiveness. Since promulgation of the proportionality test in 1979, the medal share won by the United States Olympic team has dramatically and predictably declined, the breakup of the Soviet bloc notwithstanding. Quotas impair competitiveness, whether for race or gender. Extending the cogent reasoning of *Alexander v. Sandoval* to Title IX would rightly end private enforcement of these unjustified quotas and restore true opportunity and competitiveness to our athletic system. Just as victory should go to the best competitor on the field, regardless of race or gender, teams should be funded for the most talented and motivated.

A. Athletic Competitiveness and Opportunities Have Declined Sharply Due to the Enforcement of Title IX Quotas Through the Private Cause of Action.

Never in history has the United States participated in the Olympics and returned with such a small percentage of medals as in the last two, in 2000 and 2004.[2] Greg Louganis, a four-time Olympic gold medalist, has seen his original college diving team eliminated. For the first time, we failed to bring home a single diving medal from the recent summer games in Athens. The famous men's swimming team at UCLA that previously produced 16 Olympic champions has been terminated due to the Title IX quotas. Our Olympic swimmers are now heavily dependent on private clubs rather than schools. In 2002, Howard University felt compelled to eliminate its baseball team entirely, and its wrestling team too. Mark Asher, "Howard Drops Baseball, Wrestling," *Washington Post*, D1 (May 23, 2002). The American team in baseball, our national pastime, failed even to qualify to compete at the Olympics in Athens. The United States could win only one gold medal in wrestling in 2004. In fact, no American men's team (other than rowing and relays) was able to win the gold medal this year, and most of the individual men and women gold medal winners developed their skills in private clubs rather than Title IX programs.

Enforcement of Title IX quotas through the private cause of action has caused pervasive elimination of wrestling teams at college. In 1981-82, 52.7% of NCAA Division I colleges had a wrestling team. By 2000-01, only 27.1% of colleges did. *See* NCAA Sport-by-Sport Participation and Sponsorship-Men's Sports 1982-2001, at 119.[3] Despite a substantial

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[2] *See* http://www.fanbay.net/olympics/us.htm (viewed Oct. 3, 2004).

[3] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/091-120.pdf (viewed Oct. 4, 2004).

increase in the number of colleges in the NCAA Division I during that period, the number of athletes competing in wrestling declined from 3,659 to 2,662. *Id.* Similar declines occurred in NCAA Divisions II and III. Overall, the number of colleges in the NCAA increased from 787 to 1,049 from 1981-21 to 2000-01, yet the number of wrestlers declined from 7,914 to 5,966. *Id.* This decline is due not to high costs of wrestling (it is inexpensive) nor to any decline in demand, which remains high as reflected by the continuing popularity of high school programs. *See* National Federation of State High School Associations Participation Study 1971-01, at 191.[4]

The private cause of action has forced schools even to eliminate self-funded wrestling teams that impose no burden on the institution. Why? Because private lawsuits invoke the informal quotas in a way that the Executive Branch never would. The private litigants demand the "proportionality" that encourages colleges to reduce the proportion of men on sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This bean-counting approach favors sports with large squad sizes for women, and reducing men's squad sizes or completely eliminating their teams. The resulting distortion is hurtful to both women and men.

The March 2001 General Accounting Office (GAO) report bears this out. In the 1980s and 1990s, women's sports with large squad sizes have ballooned. *See* United States General Accounting Office (GAO), "Intercollegiate Athletics, Four-Year Colleges' Experiences Adding and Discontinuing

[4] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004).

Teams," GAO-01-297 [hereinafter, *GAO Report*] 12 (Mar. 2001). Rowing (crew) is an example. It features the largest average squad size for women, an enormous 46.3 members per team. *Id.* at 9-12. The number of these teams increased by 184% during this time period, despite little to no interest at the high school level. *Id.* at 12. The University of Massachusetts women's rowing coach, Jim Dietz, bluntly admitted, "The reason we're here—everybody knows it—is for gender equity." Jessica Gavora, *Tilting the Playing Field* 66 (2002). Women's water polo, another large-squad-size sport, increased for women by 3,600%. *GAO Report* at 12. Women's equestrian, boasting an average squad size of 26.2, exploded with a 486% increase as athletic directors seek numerical balancing. *Id.* at 9-12. These increases result not from a boom in high school demand for these opportunities, but from colleges' attempt to boost women's participation numbers.

Meanwhile, an historically popular sport for women suffered the consequences of planning-by-the-numbers. Gymnastics fell by 53% during this time period. *Id.* at 12. During a time when Title IX required massive expenditures on women's sports to increase opportunities, women's gymnastics was cut from 190 teams to only 90. This reflects the small squad size of a gymnastics team, making it unattractive in the numbers game. The small squads of fencing and archery, other women favorites, also fell sharply. *Id.* As a result, nearly all of the women on the Olympic gymnastics team developed their skills in private clubs rather than Title IX programs. In the 2000 Olympics we failed to win a single women's gymnastics medal, and in 2004 the only gymnastics medals were won by private club, non-Title IX athletes.

In sports for which women share the practice facility with men, the elimination of the men's team means that the practice facility is eliminated for women too. Fencing is an example. The elimination of 42 men's fencing teams between 1981-82 and 1998-99 caused a similar elimination of nearly

as many teams (31) for women. *Id.* Archery, too: the number of men's teams declined during the period to a total of only six in 1998-99, and the number of women's archery teams declined to the same small number. *Id.*

On the men's side, the combination of the proportionality test and private cause of action has caused declines in most of the large squad sports. Wrestling teams, as discussed above, have declined by 40%, reflecting a drop of the sport by an astounding 171 schools; 37 schools dropped football; 27 dropped outdoor track; 25 dropped swimming; and 10 ended ice hockey. *Id.* at 13.

An often cited example by proponents of the private cause of action is women's soccer, which did grow by 1,058% in college. *Id.* at 12. But that growth is not attributable to the private cause of action. Rather, this is an example of how supply met demand *without* private litigation, as girls' soccer grew by 912% in high school over the comparable period.[5] As such, soccer serves as the best proof that intercollegiate teams increase in proportion to demand, without the need for any private "attorneys general" fueling litigation across the country.

America has a hallowed tradition of producing tremendous women athletes long before the quotas of Title IX. Jackie Joyner-Kersee, "Babe" Didrikson Zaharias, Wilma Randolph, Pat McCormick, Althea Gibson and Bonnie Blair were among the greatest. Pat McCormick, for example, won double gold medals in diving at back-to-back Olympics, with

[5] According to the National Federation of State High School Associations, the number of girls' interscholastic soccer teams increased from 599 to 5,463 from 1977 to 1994, the high school years corresponding to the GAO's 1981-1998 survey of intercollegiate sports. *See* National Federation of State High School Associations Participation Study 1971-01, at 187. (http://www.ncaa.org/library/research/participation_rates/1982-2001/ 175-192.pdf).

her second pair of gold medals coming only five months after she gave birth. But the Title IX quotas, enforced by an unjustified private cause of action, have choked off opportunity for women divers and many other promising competitors. Petitioner's *amici* pretend that Title IX-funded women athletes have contributed to society like never before. But Pat McCormick went on to initiate a special program for the disadvantaged after her athletic triumph. Top achievers among Title IX-funded women athletes today seem instead to be posing nude in *Playboy*. Dan Bickley, "Hats Off to Women with Clothes On," *Arizona Republic*, 1C (Aug. 29, 2004). This is progress?

In sum, the implied private cause of action under Title IX, combined with the proportionality test, has been very hurtful to opportunity and competitiveness of sports in schools.

B. Men Have a Far Greater Interest in Competitive Sports than Women, and No Private Cause of Action Should Be Allowed to Exploit that Difference as Alleged Discrimination.

Male and female demand for competitive sports are far from equal. Women do not have as great an interest in spectator team sports as men do, and the converse is true for many extracurricular activities. It is scientific, not "stereotypical", to survey students and observe their differences in interests and needs by gender. To no one's genuine surprise, surveys show that high school senior boys are far more physically active than high school senior girls. For example, the Department's National Center for Educational Statistics (NCES) polled high school seniors who "actively participate in sports, athletics or exercising [e]very day or almost every day" over a fifteen year period from 1980 to 1994. By a wide twenty percent margin, males were more active than females in athletic activity. *See* Thomas Snyder and Linda Shafer, U.S. Department of Education, National Center for Education Statistics, *Youth Indicators*, 1996 (NCES 96-027) [herein-

after, *NCES Study*], at 110.[6] Similarly, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females do. *Id.* In 1992 and 1993, over twice as many high school males exercised vigorously as females. *Id.* This is a genuine difference in athletic interest, encompassing exercise beyond available competition.

This obvious disparity is reinforced simply by attending a sports stadium or visiting a weight room, or observing the advertisements on televised sporting events. *See* John Tierney, "Why Don't Women Watch Women's Sports?" Week in Review, *N.Y. Times* (June 15, 2003) ("The audience for this year's championship game in women's college basketball was 57 percent male, according to Nielsen Media Research. Annika Sorenstam's appearance in the Colonial golf tournament last month may have been a giant leap for women, but 65 percent of the witnesses were men.").

The private cause of action under Title IX relies on the fiction that differences by gender in enthusiasm for competitive sports do not exist. Yet men and women are no more likely to have identical interests in competitive sports in college than they were in high school, where their interests diverged by a wide margin. *See NCES Study* at 110. Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women.

Former Senator Birch Bayh argues for gender equality in participation, something Congress never passed. He complains that "women athletes still lag behind their male counterparts. For example, . . . 53% of the student population are women [while] 41% of the athletes are women." Brief *Amicus Curiae* of Birch Bayh in Support of the Petitioner [hereinafter, *Bayh Brief*] at 23. But there is nothing alarming about

[6] *See* http://nces.ed.gov/pubs98/yi/y9647a.asp (viewed Oct. 4, 2004).

these figures, which show less divergence than the enthusiasm for exercise in the NCES survey. Title IX does not mandate that more women become interested in sports, and we should not launch thousands of private attorneys general on a quest for that misguided goal. Bayh is free to argue that Title IX be expanded, but that is not a task for the judiciary. Congress has already spoken, and it expressly prohibits the quota approach urged here:

> Nothing contained in . . . this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.

20 U.S.C. § 1681(b).

Bayh argues in his brief that:

> Thanks to the progress Title IX has produced in college athletics, women have made great strides in professional sports. Women athletes have established the Women's National Basketball Association, the Women's United Soccer Association, and participate on teams within the United States Soccer Federation.

Bayh Brief at 22-23. There were five women's professional leagues formed after the 1996 Olympics in Atlanta. But four out of five failed and no longer exist, and the fifth survives based on funding by the men's professional basketball team. *See* Selena Roberts, "Heroines of '96 Find Road Isn't Paved With Gold," *N.Y. Times*, D6 (Aug. 27, 2004) ("After the Atlanta Games, five professional women's leagues were formed, but only one remains."). This would surprise no one who recognizes the vast difference in interest in men's sports compared to that of women's sports. Participation by gender

on college teams should be based on interest and talent; private causes of action should not be permitted to seek damages based on the faulty premise that interest in sports is the same for both genders.

Yet wherever there is a disparity in participation by men and women, or boys and girls, in competitive sports, a private cause of action lurks around the corner to loot the school. Equality of outcome in participation, even though it often requires discriminating against the most interested and motivated, is self-defense against the mugging. Nothing in Title IX justifies these legal tactics.

Even an imbalance in funding caused by *private donations* can trigger a Title IX lawsuit. The effect is to discourage the traditional and essential fundraising practices of many school sports programs. "Title IX provides almost a disincentive to parents who want to donate their time or money to improve the athletic facilities," said Bruce Gibbs, the director of schools for Cheatham County in Tennessee, the subject of one complaint. "Because those parents will want to do it for the one sport their kid plays. But a lot of school systems can't allow that kind of effort for just one sport because it can cause an imbalance." Bill Pennington, "Title IX Trickles Down To Girls of Generation Z," *N.Y. Times*, D1 (June 29, 2004).

Bayh concludes in his brief that "[o]ur daughters, like our sons, will expect the opportunity to participate on our college and university athletic teams." *Bayh Brief* at 22. But the combination of the proportionality test and the private cause of action ensures that will **not** happen. Men are seeing sharply decreasing opportunities on college teams, and even women are suffering from elimination of small-squad teams like gymnastics and archery. The land of opportunity has become a field of quotas and senseless denial of opportunity.

No longer does the prize go to the swiftest, but rather to the gender that makes the overall numbers balance.[7]

The mischief caused by this informal regulation and the implied private cause of action has been disastrous. To take just one example, plaintiffs brought a federal lawsuit against Brown University in 1992 over its budgetary decision to recast two men's and two women's sports teams as "intercollegiate" rather than "varsity". This decision affected more men than women, but the private cause of action hooked itself to Title IX. The litigation spanned over ten years and Brown was ultimately compelled to pay over one million dollars in plaintiffs' attorney's fees. *See Cohen v. Brown Univ.*, 2001 U.S. Dist. LEXIS 22438 (D.R.I. Aug. 10, 2001), *aff'd as modified*, 2001 U.S. Dist. LEXIS 20714 (D.N.H. Dec. 5, 2001) (later supplemented further).

Women's rowing first became an NCAA sport in 1997, but 85 colleges have quickly added it to their programs. Is this because of an outpouring of interest by women athletes? Not at all. In fact, many college scholarships are given to women who had never rowed before, simply to up their numbers. Juliet Macur, "Never Rowed? Take a Free Ride," *N.Y. Times*, D1 (May 28, 2004). "In the fall, rowing is a sport that you carry 70 to 80 people, then in the spring at least 46 kids get out and race," explained Ohio State's athletic director, Andy Geiger. "It's an expensive sport, but it's worth it. It really does help offset football." *Id.* "Offset" football? Women's rowing should not have anything to do with men's football. Mr. Geiger can only mean that the large squad size in

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[7] It is worth noting that Bayh began his arguments here for equal gender participation by giving credit solely to himself for authoring Title IX, despite that nearly everyone else credits the late Representative Edith Green as the true author. Her compelling views are quoted in the Conclusion, *infra*.

women's rowing helps meet the senseless quota target by offsetting the large squad size in men's football.

No one should be surprised, and it is no evidence of discrimination, when many talented women say "no thanks" to intercollegiate competition. The Title IX litigation against Brown University revealed that there were 93 unfilled positions for women on varsity teams. *See Tilting the Playing Field*, *supra*, at 79. It is typical for colleges to have difficulty finding women to meet its numerical athletic targets. The California State University/Cal-NOW Consent Decree Final Report on Title IX compliance found that "not enough qualified student-athletes accepted the offer" to participate in a summer school program designed to increase female athletes' overall numerical participation. *Id.* at 67. The *Journal of the American Medical Association* published data showing a higher rate for traumatic brain injuries to girls than boys in comparable sports. John Powell and Kim Barber-Foss, "Traumatic Brain Injury in High School Athletes," 282 *JAMA* 958-63 (1999).[8] In girls' softball, the rate of brain injury was double that for boys' baseball. *Id.* Knee injuries to girls and women, especially the torn anterior cruciate ligament (ACL) occur at a much higher rate for women in competitive sports than for men, and they are also more difficult to repair. Steroid use, spurred by competitive forces, may be particularly injurious to women. Many college women rationally choose not to compete, and their decisions should be properly factored into the analysis.

In deploring and ridiculing the senselessness of gender quotas, one college student published this amusing solution:

> [C]ollege sports for women should be compulsory. Granted, many women may insist they don't want to play sports, but after generations of patriarchal oppression, it isn't realistic to think women really know what they want. Even if they do, it may not be what radical feminists want for them. The goal of perfectly equal gender ratios is more important than what anybody 'wants.'

Arrah Nielsen, *University Daily Kansan* (Dec. 9, 2003). Though tongue-in-cheek, his argument rings true: what should matter is how many want to and can play the sports, not how many are enrolled in the school. *Cf. Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989); *Hammon v. Barry*, 826 F.2d 73, 75 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988). Indeed, the Supreme Court has called it "nonsensical" to measure alleged discrimination by comparing participation levels from highly specialized pursuits with the general population. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989); *cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 997 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value").

Men and women have very different interests in competitive sports, and private causes of action denying such differences should not be allowed.

III. PETITIONER ENJOYED ADEQUATE ALTERNATIVE REMEDIES.

Title VII preempts Title IX for claims of employment discrimination as implicitly asserted by Petitioner Jackson here. A loophole in Title VII preemption should not be created just because the alleged direct victims of the discrimination were not themselves employees. The preemption can only be a function of the status of the plaintiff. If he is an employee, and Jackson was, then Title VII is the exclusive remedy for his claim of discrimination. Otherwise, people might be able to bypass Title VII by basing their claim

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[8] *See* http://jama.ama-assn.org/cgi/content/abstract/282/10/958

of discrimination on another class, such as customers or applicants.

Petitioner Jackson claims that he was a victim of unlawful discrimination aimed at his players. This cannot exempt petitioner from the exclusive remedies of Title VII for employment discrimination. "The Supreme Court has indicated that courts should hesitate before concluding that different statutory schemes provide parallel paths from a particular injury to a particular form of relief. The Court has held that, if Congress intended that one of the statutory schemes should be the exclusive way to vindicate a right, then plaintiffs are required to sue only under that statute." *Waid v. Merrill Area Public Sch.*, 91 F.3d 857, 861 (7th Cir. 1996) (citing *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979)). *See also Gibson v. Hickman*, 2 F. Supp. 2d 1481 (M.D. Ga. 1998) ("This court agrees with those courts finding that Title VII preempts employment discrimination claims for money damages brought under Title IX. To hold otherwise would eviscerate Title VII's technical and administrative requirements, thereby giving plaintiffs who work at federally funded educational institutions unfettered ability to bring what are in reality Title VII sexual discrimination claims without adhering to the same rules required of every other employment discrimination plaintiff in the country.").

Title IX simply does not entertain claims of employment discrimination based on gender. The U.S. Equal Employment Opportunity Commission (EEOC) is the appropriate entity to handle complaints of this sort, rather than federal court. Claimants can file their complaints with the EEOC whenever they feel victimized by gender discrimination, and Title VII provides the procedures and remedies for such actions. Nothing in Title IX warrants establishing an entire new channel for complaints about matters like a change in coaching of the school basketball team.

The government observes that "in Title VII, the prohibition against retaliation is one in a series of prohibitions against discrimination in employment that specify in great detail the kind of discrimination prohibited. Title IX's prohibition against discrimination, by contrast, is contained in a single general prohibition." Govt. Br. at 21 (citations omitted). This is a distinction without a difference. Title VII is the federal statutory framework for claims of employment discrimination, which is what petitioner Jackson essentially asserts. Title IX does not provide the comprehensive set of remedies that Title VII does, and Title IX should not be expanded to interfere with Title VII.

Petitioner even had another cause of action available to him in addition to Title VII. He could have sued based on the First Amendment for retaliation against his speech. As a government employee, he enjoyed a First Amendment right "to speak freely [about matters of public concern] without fear of retaliatory dismissal." *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968) (public employees have First Amendment rights "to speak out freely [about matters of public concern] without fear of retaliatory dismissal"); *see also Connick v. Myers*, 461 U.S. 138, 149 (1983) (same). There is no need or basis for creating a third avenue to relief for an allegedly improper changing of coaches at the helm of the girls' basketball team.

Petitioner had adequate alternative means for redress of his claims, based on Title VII or the First Amendment. It is not necessary or desirable to create yet another federal remedy for a deposed school basketball coach who did not even lose his job. Title IX does not provide yet another remedy for him, and his claims were correctly denied by the court below.

CONCLUSION

The author of Title IX, Representative Edith Green, later lamented that:

> In 1972 when we enacted the Higher Education Act—including Title IX—to end discrimination against women, we sought to be exceedingly explicit so that the establishment of quotas would be prohibited. I was surprised and dismayed when complaints from colleges and universities came in stating that the Department of Labor was requiring them to meet quotas. . . . Title IX was not designed to do away with intercollegiate sports.

Edith Green, "The Road Is Paved With Good Intentions," Address at Brigham Young University (Jan. 25, 1977). Representative Edith Green would be even more "surprised and dismayed" to see the judicial invention of a private cause of action to enforce Title IX in ways never intended.

The decision below dismissing petitioner's claims should be affirmed.

Respectfully submitted,

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